IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 23..3..2007

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The Hon'ble Mr. Justice K.CHANDRU

W.P. Nos.40249 and 42041 of 2006

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A.Asokan .. Petitioner in both W.Ps.

vs.

1. The I I 558 Kudhiraichandal
Primary Agricultural Co-op. Bank Ltd.
Rep. by its Special Officer
Kudhiraichandal Post .. R1 in WP 40249/06

2. The Villupuram District Committee
of Common Cadre Service for
Secretaries of Primary Agricultural
Co-operative banks
rep. by its Chairman cum
Registrar of Co-op. Societies
Villupuram .. Respondent in WP 42041/06
R2 in WP NO. 40249/06

W.P.No.40249 of 2006 is filed under Article 226 of the Constitution of India seeking for issue of writ of Mandamus directing the first respondent to pay the subsistence allowance as per G.O. Ms.No.55 Co.op Food and Consumer Protection Department dated 12.3.2000 from 01.4.2003 and continue to pay the same till the completion of the disciplinary proceedings into the charge memo dated 27.5.2000 and W.P.No.42041 of 2006 is filed seeking for writ of Certiorari calling for the records relating to the show cause notice Na ka. No.2086/2005 Agrl. S S dated 28.9.2006 of the respondent along with the enquiry report dated 27.4.2006 and quash the same.

For Petitioner : Mr.S.Venkataraman

For Respondents : Mr.V.R.Thangavelu, GA

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C O M M O N O R D E R

I have heard the arguments of Mr.S.Venkataraman, learned counsel appearing for the petitioner and Mr.V.R.Thangavelu, learned Government Advocate, taking notice for the respondents and have perused the records.

2. In the first writ petition being W.P.No.40249 of 2006, the petitioner prays that the first respondent Co-operative Society should be directed to pay the subsistence allowance to him in terms of G.O. Ms.No.55 Cooperation, Food and Consumer Protection Department dated 24.3.2000 with effect from 01.4.2003 and continue to pay the same till the completion of the disciplinary proceedings initiated subsequent to the charge memo dated 27.5.2000. In the second writ petition (W.P.No.42041 of 2006), the petitioner has challenged the show cause notice dated 28.9.2006 asking the petitioner to submit his explanation on the findings of the enquiry officer dated 27.4.2006 was sought for.

3. Mr.S.Venkataraman, learned counsel appearing for the petitioner contended that he has not been paid any subsistence allowance for more than last three years and, therefore, non-payment of subsistence allowance will vitiate the disciplinary proceedings.

4. In respect of non-payment of subsistence allowance, the petitioner has already filed a writ petition being W.P.No.40249 of 2006 which was admitted as early as 19.10.2006. Therefore, the contention as to the eligibility of the payment of subsistence allowance can be gone into in that writ petition. Therefore, the petitioner cannot invalidate the show cause notice arising out of the enquiry proceedings, which has now culminated into a show cause notice and is pending in its final stage.

5. If the petitioner has any grievance with reference to the conduct of the enquiry or the findings, he can always submit his explanation and wait for the outcome of the enquiry proceedings. Therefore, this Court is not inclined to interfere with the show cause notice where no prejudice is caused to the petitioner and hence, the W.P.No.42041 of 2006 is dismissed and the petitioner is directed to submit his explanation within a period of two weeks from the date of receipt of a copy of this order.

6. With reference to W.P. No.40249 of 2006, the argument of the learned counsel for the petitioner is that the post belongs to common cadre service and the service conditions are governed by G.O.Ms.No.55 Co-operation, Food and Consumer Protection Department dated 24.3.2000 and that as per the said

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regulation, the petitioner is entitled for subsistence allowance and regulation No.29 sub-clause (d) reads as follows:

> "(i) A cadre employee under suspension shall be entitled to a subsistence allowance as per the payment of Subsistence Allowance Act 1981."

7. Normally, this writ petition should have been dismissed on the basis of the decision of the larger Bench of this Court reported in 2006 (4) CTC 689 [K.Marappan vs. Deputy Registrar of Co-operative Societies, Nnammkkal]. However, in paragraph 21, the Bench itself carved out certain exceptions in which a writ petition can be maintained even against the Co-operative Society. Paragraphs 21(3) and 21(4) sets out that when there is a statutory duty upon a society and if any violation of such duty is made, a writ would be issued for compliance of the same.

8. In the present case, G.O.Ms.No.55 Cooperation, Food and Consumer Protection Department dated 24.3.2000 has been framed in terms of Section 75 of the Co-operative Societies Act, 1983 on their statutory regulations. Further, Regulation 29(d) only incorporates the rate of subsistence allowance provided under the PSA Act even though the provisions of the said Act are not applicable to the Secretaries of the Co-operative Societies, who are in full control of the Society. The Courts have also held non-payment of Subsistence allowance amounts to deprivation of liberty provided under Article 21 of the Constitution of India and an employee cannot defend himself effectively in a domestic enquiry when he is not even paid subsistence allowance. Even though the Special law provides for mechanism for recovering Subsistence Allowance, a person like the petitioner, who belongs to the common cadre, cannot move the machinery under the Act. Under these circumstances, the W.P.No.40249 of 2006 is being entertained.

9. This question has already come up for consideration by this Court vide judgment in Manupatra Law Reports (Madras) in MANU / TN / 2655 / 2006 [S.Poongavanam vs. The Special Officer, HH 565 Kadaladi Primary Agricultural Co-operative Bank Ltd., Thiruvannamalai District and another] and this Court held that in respect of common cadre employees, their service conditions are governed by G.O.Ms.No.55 Cooperation, Food and Consumer Protection Department dated 24.3.2000 and, hence eligible to claim subsistence allowance in terms of the Tamilnadu Primary Agricultural Co-operative Bank Common Cadre Regulations 2000.

10. But the question does not end therein. Because, the Regulation 29(d) clearly says that a cadre employee shall be paid subsistence allowance as per the Payment of Subsistence Allowance Act, 1981 [for short, 'PSA Act']. But, however, Secretary of a Society is not eligible for subsistence allowance

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in terms of the PSA Act as he is not an employee within the meaning of the said Act. The said decision is reported in 2002 (4) CTC 339 [The Management, T.P.Spl. 67 Goundanpalayam Primary Agricultural Cooperative Bank Ltd. vs. Assistant Commissioner of Labour], wherein a learned Judge has held that the Tamil Nadu Co-operative Society Act is a special law and, therefore, a person designated as a Secretary, who is in overall control of the Society, is not entitled to claim subsistence allowance as per the Act.

11. But when the Regulation states that as per the provisions of the PSA Act, a cadre employee is entitled for subsistence allowance, can it be extended by saying that even persons, who are not covered by the provisions of the PSA Act will be entitled to payment of subsistence allowance as per the Act? Is it a case of a subsequent legislation borrowing or incorporating certain provisions of earlier legislation? These two questions still looms large.

12. When an earlier Act or certain of its provisions are incorporated become part and parcel of the later Act as if they had been bodily transposed into it. The incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. But this must be distinguished from a referential legislation which merely contains a reference or the citation of the provisions of an earlier statute. In a case where a statute is incorporated, by reference, into a second statute, the repeal of the first statute by a third does not affect the second. The later Act along with the incorporated provisions of the earlier Act constitute an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act. However, where in later Act there is a mere reference to an earlier Act, the modification, repeal or amendment of the statute that is referred, will also have an effect on the statute in which it is referred. It is equally well settled that the question whether a former statute is merely referred to or cited in a later statute, or whether it is wholly or partially incorporated therein, is a question of construction.

13. In U.P. Avas Evam Vikas Parishad Vs. Jainul Islam (AIR 1998 SC 1028) the Supreme Court has observed as follows:-

> "A subsequent legislation often marks a reference to the earlier legislation so as to make the provisions of the earlier legislation applicable to matters covered by the later legislation. Such a legislation may either be (i) a referential legislation which merely contains a reference to or the citation of the provisions of the earlier statute; or (ii) a legislation by incorporation whereunder the provisions of the

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earlier legislation to which reference is made are incorporated into the later legislation by reference. If it is a referential legislation the provisions of the earlier legislation to which reference is made in the subsequent legislation would be applicable as it stands on the date of application of such earlier legislation to matters referred to in the subsequent legislation. In other words, any amendment made in the earlier legislation after the date of enactment of the subsequent legislation would also be applicable. But if it is a legislation by incorporation the rule of construction is that repeal of the earlier stature which is incorporated does not affect operation of the subsequent statute in which it has been incorporated. So also any amendment in the statute which has been so incorporated that is made after the date of incorporation of such statute does not affect the subsequent statute in which it is incorporated and the provisions of the statute which have been incorporated would remain the same as they were at the time of incorporation and the subsequent amendments are not be read in the subsequent legislation."

14. It is seen that G.O.Ms.No.55, Cooperation, Food and Consumer Protection Department dated 24.3.2000 only creates a common cadre service for all the Secretaries of the Primary Agricultural Co-operative Banks. Automatically, such a cadre is not provided under the PSA Act because such a person does not come within the definition of the word 'employee' within the meaning of Section 2(a) of the said Act. Therefore, when the Government frames a statutory regulation in terms of Section 75 of the Tamil Nadu Co-operative Societies Act, it must be aware of the provisions of the PSA Act. Therefore, the reference to the PSA Act under Regulation 29(d) is with a conscious understanding that though the said Act does not apply to the cadre of Secretaries, still the Government wanted to adopt the rates provided under the said Act. Therefore, it is a case of an incorporation of an earlier legislation.

15. In the light of the above finding, it must be stated that the respondent Society will have to work out the rate of subsistence allowance to be paid to the petitioner as per the provisions of the PSA Act.

16. Accordingly, W.P.No.40249 of 2006 shall stand allowed and the first respondent Society is hereby directed to pay the writ petitioner the subsistence allowance for the period from 01.4.2003 till the completion of the enquiry instituted against him for payment of subsistence allowance in terms of the rates

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provided under the T.N. Payment of Subsistence Allowance Act, within a period of four weeks from the date of receipt of a copy of this order. However, there will be no order as to costs. Connected Miscellaneous Petitions will stand closed.
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Sd/

Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Special Officer
I I 558 Kudhiraichandal
Primary Agricultural Co-op. Bank Ltd.
Kudhiraichandal Post

2. The Chairman cum Registrar of Co-op.Societies
Villupuram District Committee
of Common Cadre Service for Secretaries
of Primary Agricultural Co-operative banks
Villupuram

+ one cc to Mr. S. Venkataraman, Advocate sr no. 18165

KSJ(CO)
NM(29.03.07)

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